No. 09-1277

NOV 24 2009

In The
Supreme Court of the United States

REGER DEVELOPMENT, LLC,
an Illinois limited liability company,
for itself and all those similarly situated,

Petitioner,

vs.

NATIONAL CITY BANK,
a national banking association,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

CHAD A. SCHIEFELBEIN
VEDDER PRICE P.C.
222 North LaSalle Street
Suite 2600
Chicago, Illinois 60601-1003
(312) 609-7500
cschiefelbein@vedderprice.com

Counsel for Respondent National City Bank

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Was the Court of Appeals correct to affirm the District Court's dismissal, with prejudice, of Petitioner's Complaint for breach of contract and fraud under Illinois law when: (i) Petitioner's Complaint and the exhibits attached thereto conclusively demonstrated that Petitioner's claims were not plausible, and (ii) Petitioner waived review of the District Court's denial of Petitioner's Motion for Reconsideration by failing to properly present the issue to the Court of Appeals?

CORPORATE DISCLOSURE STATEMENT

Respondent National City Bank, a national banking association, merged with PNC Bank, also a national banking association. PNC Bank is owned by PNC Bancorp., Inc. The stock of PNC Bancorp, Inc. is owned by the PNC Financial Services Group, Inc., a publicly traded corporation.

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STATEMENT OF THE CASE

This is a putative class action based on diversity jurisdiction and governed by Illinois law that Petitioner, Reger Development, LLC, filed against Respondent, National City Bank, in a failed attempt to prevent National City from exercising its contractual rights under a demand note. (Appendix A to Petition ("Pet. App. A.") at 2a.) On June 25, 2007, Reger entered into a revolving line of credit secured by a promissory note. The note stated (no less than eight separate times) that it was payable on "demand." The demand feature of the note was explicit:

> PROMISE TO PAY. Reger Development, LLC ("Borrower") promises to pay to National City Bank ("Lender"), or order, in lawful money of the United States of America, on demand, the principal amount of Seven Hundred Fifty Thousand & 00/100 Dollars ($750,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance. Interest shall be calculated from the date of each advance until repayment of each advance.
>
> PAYMENT. Borrower will pay this loan in full immediately upon Lender's demand.
>
> * * *
>
> LENDER'S RIGHTS. Upon Lender's demand, Lender may declare the entire unpaid principal balance under this Note and all

> accrued unpaid interest immediately due, and then Borrower will pay that amount[.]
>
> * * *
>
> GENERAL PROVISIONS. . . . Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them. . . .
>
> * * *
>
> NO COMMITMENT. This Note evidences an arrangement under which Borrower may obtain such advances as Borrower may from time to time request and as Lender in its sole discretion may from time to time be willing to make, subject to the condition that the aggregate unpaid principal balance hereunder shall not at any time exceed the face amount of this Note. NOTWITHSTANDING ANY PROVISION OR INFERENCE TO THE CONTRARY, LENDER SHALL HAVE NO OBLIGATION TO EXTEND ANY CREDIT TO OR FOR THE ACCOUNT OF BORROWER BY REASON OF THIS NOTE.
>
> * * *
>
> GENERAL PROVISIONS. . . . All such parties also agree that Lender may . . . take any other action deemed necessary by Lender without the consent of or notice to anyone. . . .

(*Id.* at 3a-4a.)

Kevin Reger, Reger's sole and managing member, executed the note on behalf of Reger. The note stated

that Reger read, understood and agreed to all of the provision contained therein:

> PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL OF THE PROVISIONS OF THIS NOTE, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. BORROWER AGREES TO THE TERMS OF THIS NOTE.

(*Id.* at 4a-5a.)

Upon signing the note, Reger paid a $5,000 closing fee and National City immediately funded the line of credit. Reger then drew funds, as needed, from time to time. National City approved the draws. (*Id.* at 5a.)

On or about June 11, 2008, approximately one year after Reger executed the note, National City contacted Reger and requested updated financial statements and tax returns in accordance with the express terms of the note. Two months later, on August 19, 2008, National City contacted Reger and asked Reger to pay down $125,000 towards the outstanding principal of the note. Petitioner complied the following day. (*Id.* at 5a.)

On September 9, 2008, National City contacted Reger and asked Reger to "term out" approximately $300,000 of the note by having one of Mr. Reger's other businesses agree to take out a three-year loan in that amount to be secured by a second mortgage on some real estate. National City also told Reger that

the line of credit would be reduced from $750,000 to between $400,000 and $500,000. (*Id.*)

Reger "expressed surprise" about the these requests and asked if National City would call the note if Petitioner did not agree. National City told Petitioner that "there is a possibility that we may demand payment of the line." (*Id.*)

Reger did not accept or reject National City's request to "term out" the note. Instead, Reger filed a putative "class action" complaint against National City in Illinois state court and accused National City of "breach of contract" and "fraud." Reger alleged that National City had no right to demand payment absent a "default" by Reger, and that, by seeking Reger's consent to restructure the note while holding out the possibility of calling the note under its express terms, National City violated the terms of the note and engaged in a "scheme to defraud." (*Id.* at 5a-6a.)

National City removed the complaint to the U.S. District Court for the Northern District of Illinois, Eastern Division. The District Court dismissed the complaint and entered judgment in favor of National City. The District Court reasoned that Reger's claims were not plausible based on the express terms of the note, which was attached to the complaint. The District Court also reasoned that Reger had not alleged, and could not allege, a claim for fraud. (Appendix B to Petition ("Pet. App. B") at 19a-27a.)

Reger filed a motion to reconsider, which was denied, and then appealed the judgment to the U.S. Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the District Court's judgment.[1] The Court of Appeals stated that, "in light of controlling law," Reger's complaint appeared "vacuous." The note did not bear the "interpretative load" that Reger wanted to "place on [its] shoulders." Moreover, Reger could not claim that National City committed fraud merely by following the terms of the note. Lastly, under Article 2 of the Uniform Commercial Code (as enacted by Illinois), the covenant of good faith and fair dealing did not apply to demand instruments such as the note and, even if it did, Reger could not use the covenant to alter the express terms of the note. (Pet. App. A at 5a-6a, 15a.)

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[1] Reger failed to properly raise the District Court's denial of its motion to reconsider in its appellate brief. As a result, the Court of Appeals held that Reger waived the issue, but the waiver did not affect the outcome of the appeal. (*Id.* at 7a.)

REASONS FOR DENYING THE PETITION

A. The Decisions Below Do Not Conflict With a Decision of This Court or Any Court of Appeals

The Petition should be denied because Reger does not present any compelling reason for the Petition to be granted. *See* Sup. Ct. R. 10. The decisions below do not conflict with a decision of this Court or a decision by any Court of Appeals, and none are identified in the Petition.

B. The Decisions Below Do Not Present an Important Question of Federal Law

Additionally, the decisions below do not present an important question of federal law, much less a question of federal law. *See id.* On the contrary, the decisions below represent application of an individual state's law (Illinois) on commercial paper, contract and fraud. (Pet. App. A at 4a, 8a-15a.) Reger acknowledges as much in the Petition. (Petition ("Pet.") at 5.)

C. The Decisions Below Do Not Call for the Exercise of This Court's Supervisory Power

The decisions also below do not call for the exercise of this Court's supervisory power. *See* Sup.

Ct. R. 10. Neither the District Court nor the Court of Appeals departed from the accepted and usual course of judicial proceedings when rendering their decisions.

As an initial matter, Reger does not contend that the District Court or the Court of Appeals misapplied the standard governing motions to dismiss. *See Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009). Reger also does not contend that that the Court of Appeals erroneously determined that Reger waived appellate review on its motion to reconsider. (Pet. App. A at 6a-7a.)

Instead, Reger accuses the District Court and the Court of Appeals of "ignoring" the "fundamental tenets of contract construction" by concluding that the parties' note was a demand note. (Pet. at 5.) However, in their written opinions, the Court of Appeals and the District Court carefully applied the "fundamental tenets" of contract construction giving each provision of the parties' note effect:

> We construe contracts by giving their unambiguous terms clear and ordinary meaning, *Reynolds v. Coleman*, 173 Ill. App. 3d 585, 527 N.E.2d 897, 902, 123 Ill. Dec. 259 (Ill. App. Ct. 1988), in an effort to determine the parties' intent. *Harrison v. Sears, Roebuck & Co.*, 189 Ill. App. 3d 908, 546 N.E.2d 248, 253, 137 Ill. Dec. 494 (Ill. App. Ct. 1989). During our review, we do not look at any one contract provision in isolation; instead, we read the document as a whole. *Martindell v.*

> *Lake Shore Nat'l Bank*, 15 Ill. 2d 272, 154 N.E.2d 683, 689 (Ill. 1958).
>
> * * *
>
> To construe the meaning of a contract, courts first look to the contract's own language, giving terms their plain and ordinary meaning. *See Mo. Pac. R. Co. v. Am. Re-ins. Co.*, 286 Ill. App. 3d 129, 676 N.E.2d 965, 968, 222 Ill. Dec. 1 (Ill. App. Ct. 1996).

(Pet. App. A at 8a; Pet. App. B at 20a.) Both courts rightly concluded that Reger's "interpretation" of the parties' note was unreasonable and conflicted with the express terms of the note.

Indeed, the Court of Appeals stated that, "in light of controlling law, [Reger's] complaint appears vacuous." The Court of Appeals distinguished the non-binding and factually inapposite case law cited by Reger, which also purport to form the basis for the Petition:

> Reger Development does cite to decisions from other jurisdictions holding that specified events of default may neuter contractual language describing a loan as payable on demand. *See, e.g., Bank One, Tex., N.A. v. Taylor*, 970 F.2d 16, 32 (5th Cir. 1992); *Reid v. Key Bank of S. Me., Inc.*, 821 F.2d 9, 14 (1st Cir. 1987); *New Bank of New England, N.A. v. J.T. Enter.*, 1992 U.S. Dist. LEXIS 7998, 1992 WL 122704, *2 (D. Mass. 1992). These authorities describe instruments with traits that look out of place in a demand

> note. Because the National City Note lacks these anomalous features, the cases have little bearing on our interpretation of the present contract.

(Pet. App. A at 9a, 11a-13a.)

Notwithstanding Reger's characterizations to the contrary, the decisions below do not "beg the question" of whether the note was a demand note that "permits call at any time with or without reason." (Pet. at 6.) Rather, the decisions properly answered that question in the negative under controlling state law. *See N.W.I. Int'l Inc. v. Edgewood Bank*, 684 N.E.2d 401, 409 (Ill. App. Ct. 1997); 810 ILCS 5/1-208 cmt.[2]

Lastly, Reger's *ad hominem* attacks on National City are improper. Nothing in the record supports Reger's characterization of National City as an "unscrupulous lender," nor does following the express terms of a contract in accordance with well-established Illinois commercial law constitute a "scheme" to defraud. (Pet. at 5.)

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[2] Section 1-208 was renumbered as "Section 1-309" by Illinois Public Act 95-895, § 5 effective January 1, 2009, approximately eighteen months after Reger executed the note. The District Court decision, which was based on National City's Motion filed in December 2008, cites to "Section 1-208," while the Court of Appeals decision cites to "Section 1-309." (Pet. App. A at 8a-9a; Pet. App. B at 24a.)

CONCLUSION

Reger argued its "interpretation" of the parties note on three separate occasions – twice before the District Court and once before a three-judge panel in the Court of Appeals. Each time, the courts soundly rejected Reger's interpretation. Reger has not carried its burden of showing any compelling reason for justifying the extraordinary remedy of a grant of certiorari. National City respectfully requests that the Petition be denied.

Respectfully submitted,

CHAD A. SCHIEFELBEIN
VEDDER PRICE P.C.
222 North LaSalle Street
Suite 2600
Chicago, Illinois 60601-1003
(312) 609-7500
cschiefelbein@vedderprice.com

Counsel for Respondent
National City Bank